

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: April 30, 2001
Defendants.	)	

RESPONSE OF THE UNITED STATES  
IN OPPOSITION TO MOTION TO DISCLOSE  
ELECTRONICALLY RECORDED MATERIAL

I  
INTRODUCTION

Defendants have filed a *Motion to Disclose Electronically Recorded Material* (“Motion”) asking the Court to issue an order instructing the United States: (1) to disclose to the defendants all electronically recorded conversations in its possession or control wherein the defendants are a party to the conversation; (2) to disclose all electronically recorded conversations with individuals who may be witnesses for the government, either in its case in chief or in rebuttal; and (3) to file, prior to trial, a list of all the recorded conversations with either the defendant or any witness. Defendants’ Motion should be denied.

II  
THE UNITED STATES HAS MET ITS DISCOVERY OBLIGATIONS

The United States has already provided defendants with all of its Rule 16 discovery, including materials responsive to section (a)(1)(A), which governs statements of the defendants. The express wording of the section, together with case law, indicates that electronic conversations

of the defendant are statements within the meaning of Rule 16(a)(1)(A) and are thus discoverable if relevant to the case. United States v. Stevens, 985 F.2d 1173, 1180 (2nd Cir. 1993). This moots the issue as to the defendants.

The government has also produced vast amounts of materials under Rule 16(a)(1)(C). Again, case law indicates that audio tapes are documents and other tangible objects within the meaning of the Rule and therefore should be turned over if: (a) they will be used by the government in its case in chief; or (b) they belong to the defendant; or (c) they are material to the defense. United States v. Reeves, 892 F.2d 1223, 1226 (5th Cir. 1990). The government has complied by turning over any materials, whether they were audio tapes, computer tapes, documents, photographs, or other materials, that met one of the three criteria listed above. That production amounted to over 120 boxes of materials. The government produced all documents and tangible objects from the three wholesalers in the Dallas-Fort Worth area during the charged conspiratorial period, certain retailers operating in the Dallas-Fort Worth area during the charged conspiracy period, and materials from other persons associated with magazine distribution in the Dallas-Fort Worth area during the conspiracy.

### III JENCKS ACT MATERIALS ARE NOT DISCOVERABLE

As a general proposition, defendants have no general authority to discover the testimony of government witnesses before trial. Fed. R. Crim. P. 16(a)(2); United States v. Ryland, 806 F.2d 941, 942 (9th Cir. 1986), cert. denied, 481 U.S. 1057 (1987). However, electronic recordings of government witnesses are considered statements within the meaning of the Jencks Act, 18 U.S.C. § 3500 (e)(2). The Act requires that statements of witnesses be produced but expressly provides

that the discovery is to take place no earlier than after the witness has concluded his testimony. Id. at subsection (a). Case precedent is uniform in refusing to compel the government to provide discovery of Jencks Act statements before the witness finishes his testimony. United States v. Murphy, 569 F.2d 771 (3rd Cir. 1978), cert. denied, 435 U.S. 955 (1978). “The blunt command of the statute together with the unequivocal legislative history has led to unbroken precedent in the Courts of Appeals denying to district courts the power to compel production of the statements of government witnesses until conclusion of direct examination at the trial.” Id. at 773. This is true even if the Jencks Act statement contains material that would be considered Brady/Giglio information. United States v. Campagnuolo, 592 F.2d 852, 860 (5th Cir. 1979) (“In each of these cases, this Court [Fifth Circuit] held that the prosecutor’s compliance with the Jencks Act provided timely disclosure under Brady.”). Accord United States v. Bencs, 28 F.3d 555, 561 (6th Cir. 1994), cert. denied, 513 U.S. 1117 (1995) (“When Brady material sought by a defendant is covered by the Jencks Act, the terms of that Act govern the timing of the government’s disclosure.” (citation omitted)). Yet this premature discovery is precisely what defendants request when they ask for both the recordings of any government witness and a pretrial listing of any recordings of the defendants and/or any government witness. Since their request ignores the explicit wording of the Jencks Act and case precedent, it should be summarily denied.

III  
CONCLUSION

The United States has met its Rule 16 discovery obligations. It has provided defendants with all of their own statements and has produced all material documents and other tangible objects from the wholesalers, retailers, and other persons associated with magazine distribution in the Dallas-Fort Worth area. The government should not be ordered to produce Jencks Act statements prior to trial. The Motion should therefore be denied.

Respectfully Submitted,

SCOTT M. WATSON  
Chief, Cleveland Field Office

\_\_\_\_\_  
“/s/”  
RICHARD T. HAMILTON, JR.  
Ohio Bar Number--0042399

MICHAEL F. WOOD  
District of Columbia Bar Number--376312

KIMBERLY A. SMITH  
Ohio Bar Number--0069513

SARAH L. WAGNER  
Texas Bar Number--24013700

Attorneys, Antitrust Division  
U.S. Department of Justice  
Plaza 9 Building, Suite 700  
55 Erieview Plaza  
Cleveland, OH 44114-1816  
Telephone: (216) 522-4107  
FAX: (216) 522-8332

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April 2001.

Richard Alan Anderson, Esq.  
Burleson, Pate & Gibson, L.L.P.  
2414 N. Akard, Suite 700  
Dallas, TX 75201

Michael P. Gibson  
Burleson, Pate & Gibson, L.L.P.  
2414 N. Akard, Suite 700  
Dallas, TX 75201

\_\_\_\_\_  
“/s/”  
RICHARD T. HAMILTON, JR.